In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,
Petitioner,

vs.

NORA D. SATTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the District Court (App. 40-55) is reported at 384 F. Supp. 765. The opinion of the Sixth Circuit Court of Appeals (App. 103-110) is reported at 522 F.2d 850.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974), in pertinent part provides:

> Section 703. (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . .

QUESTIONS PRESENTED

1. Whether an employer's disparate treatment of employees returning to employment from pregnancy and those returning to employment from sickness or injury with regard to retention of accumulated seniority constitutes unlawful discrimination on the basis of sex within the meaning of Title VII of the Civil Rights Act of 1964.
2. Whether an employer's disparate treatment of pregnant employees and those suffering from sickness or injury with regard to sick leave payments, when used as a mere pretext, constitutes unlawful discrimination on the basis of sex within the prohibition of Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

Respondent, Nora Satty, was hired by the petitioner, Nashville Gas Company (hereinafter referred to as the "Company"), as a junior clerk in the customer accounting department on March 24, 1969 and was promoted to Clerk on December 22, 1969. She continued to hold that position until December 29, 1972, when she was placed on pregnancy leave. (App. 29).

In August, 1972, Mrs. Satty learned that she was pregnant. This pregnancy was not planned, but was accidental. As soon as Mrs. Satty learned that she was pregnant she told the Company. (App. 61). At some point after informing the Company that she was pregnant, the Company's Vice-President of Personnel discussed with Mrs. Satty and two other pregnant employees the Company's policy with respect to pregnancy leaves. At that time the Company representative told Mrs. Satty and the other two pregnant employees that a decision as to when they should commence pregnancy leave would be based on their doctor's opinion, their duties with the company, their work area, and degree of public contact, but that the Company was to have the final decision as to when pregnancy leave was to commence. (App. 29). At some time prior to being placed on pregnancy leave, Mrs. Satty informed the Company that she wished to return to work after the birth of her child. (App. 64).

Friday, December 22, and Monday, December 25, were Company holidays. After plaintiff failed to report for work on December 26, December 27, December 28, and December 29, Mrs. Satty's supervisor requested her to request pregnancy leave and pregnancy leave was granted, commencing December 29, 1972. Her child was born on January 23, 1973, twenty-five (25) days after pregnancy leave commenced. (App. 30).

The Company does not have a disability plan as such. Employees absent from work due to non-occupational sickness or injury are granted paid sick leave for a specified number of days based on the employee's seniority. (App. 96-98). Employees who go on pregnancy leave are not paid any accumulated sick leave, but are paid for any accumulated vacation time. (App. 32).

At such time as an employee on sick leave is ready to return to work, he or she is generally returned to the job previously held if his or her physical condition permits. Although the Company does not feel that it is obligated to hold jobs open for an employee who is absent for extended periods of time with non job-related illness or injury, it has in practice usually held such job open. (App. 17). Employees returning from long periods of absence due to non job-related injuries do not lose their seniority and in fact their seniority continues to accumulate while absent. (App. 45).

It is the policy of the Company to permit employees on pregnancy leave to return to permanent employment when there is an available position for which such employee is qualified and for which no person permanently employed is bidding. Prior to such permanent employment becoming available it is the policy of the Company to give the employee on pregnancy leave temporary work for which she is qualified when such temporary work is available. An employee who has been on pregnancy leave and returns to permanent employment retains the seniority she had previously accumulated for purposes of pension, vacation, etc., but does not retain such seniority for the purpose of bidding on job openings. (App. 10).

Pregnant women are placed on leave of absence according to the Employment Policy Manual of the Company. (App. 98). The affidavit of the Vice-President of Personnel of the Company (App. 10) and the Stipulations of Fact drawn by the parties refer to this leave as "pregnancy leave." (App. 30). Pregnancy leave is limited to one year at the maximum. (App. 10, 30). The Company has another status known as "leave of absence" which employees may request. Two employees have requested and been granted leave of absence in the eleven (11) years preceding the trial of this case. Neither has returned to the Company. (App. 10-11). If an employee were granted such a leave of absence and later returned to the Company, that employee would not have any previously accumulated seniority for job-bidding purposes. (App. 31).

Mrs. Satty returned to work for the Company as a part-time employee on March 14, 1973. Prior to being placed on pregnancy leave, Mrs. Satty earned $140.80 per week. Upon returning as a part-time employee, the plaintiff earned $130.80 per week. (App. 11). Mrs. Satty applied for three (3) full-time jobs while working as a part-time employee. Under the Company policy, permanent employees who applied for the job were given preference over Mrs. Satty because they were determined to have more seniority. (App. 11). If Mrs. Satty had been credited with the seniority she accumulated prior to being placed on pregnancy leave, she would have been awarded any of the positions for which she applied. (App. 33). Mrs. Satty's part-time employment ceased on April 13, 1973, the project on which she was working having been completed. (App. 31).

Subsequent to her termination by the Company, Mrs. Satty filed a timely charge of sex discrimination under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission (EEOC). After receiving her "right to sue" letter, she brought an action against the Company in the United States District Court

for the Middle District of Tennessee in which the following specific aspects of the Company's employment practices were at issue (App. 35):

> 1. Payment of pregnancy benefits under the Company's group health and hospitalization insurance plan different from benefits provided under such plan for sickness and accident.
>
> 2. The denial of sick leave pay to Mrs. Satty while she was on pregnancy leave.
>
> 3. The action of the Company in requiring Mrs. Satty to commence pregnancy leave on December 29, 1972.
>
> 4. The failure of the Company to hold Mrs. Satty's job open for her while she was on pregnancy leave.
>
> 5. The failure of the Company to permit Mrs. Satty to retain her previously accumulated seniority for purposes of bidding on job openings.

Mrs. Satty also alleged that she was terminated by the Company in violation of 42 U.S.C. §2000e-3(a) for complaining about its pregnancy leave policies.

She prayed for reimbursement, back pay, reimbursement for lost sick pav and other fringe benefits, and attorneys' fees. (App. 7-8).

Mrs. Satty originally sought to maintain this action as a class action. The parties subsequently stipulated that the number of persons whom she could properly represent was not so numerous that the action could be maintained as a class action under Rule 23, Federal Rules of Civil Procedure. (App. 33).

The District Court held that the Company violated Title VII by denying sick leave pay to Mrs. Satty while she was on pregnancy leave. (App. 45). The District Court

also held that the Company's policy of not permitting Mrs. Satty to retain her previously accumulated seniority for job-bidding purposes was unlawful discrimination. (App. 44).

Based on stipulations filed by the parties in response to the District Court's opinion, the Court finally ordered (App. 57-58) that Mrs. Satty:

> (1) recover sick leave benefits that should have been paid during her pregnancy leave in the amount of $732.16;
>
> (2) be credited with sick leave benefits from March 14, 1973, the time she returned from pregnancy leave;
>
> (3) be reinstated as a permanent employee as of April 2, 1973, the date that the first permanent position after March 14, 1973 was filled with another employee whose initial date of hire was later than Mrs. Satty's;
>
> (4) recover back pay in the amount of $9,456.21, being back wages from April 2, 1973 reduced by amounts paid for temporary work with the Company, unemployment compensation, and wages from other employment; and
>
> (5) recover attorneys' fee in the amount of $3,000.00.

All of such relief was stayed pending appeal.

The Sixth Circuit Court of Appeals affirmed the judgment of the District Court and held that the exclusion of normal pregnancy from a sick leave program and the denial of seniority constituted sex discrimination under Title VII. (App. 103-111).

Thereafter, on October 7, 1975, petitioner, Nashville Gas Company, filed a Petition for a Writ of Certiorari to review the judgment of the Court of Appeals. The Petition was granted on January 25, 1977.

SUMMARY OF ARGUMENT

This case is not controlled by this Court's decision in *General Electric Co.* v. *Gilbert*, ... U.S. ....., 97 S.Ct. 401 (December 7, 1976). This Court in *Gilbert* was faced with the rather narrow issue of whether disabilities arising or connected with pregnancy could be excluded from an employer's Sickness and Accident Insurance Plan without violating Title VII. While respondent agrees that petitioner's sick leave plan is for all intents and purposes the same as the plan examined in *Gilbert*, respondent submits that because the exclusion of sick pay is only one of the many ways in which female employees who experience pregnancy are treated differently by petitioner, the holding in *Gilbert* is not controlling.

While *Gilbert* involved the mere under-inclusiveness of a Sickness and Accident Insurance Plan, this case involves a denial of sick pay, failure to hold employment positions open, and a denial of job-bidding seniority. While in *Gilbert* the denial of Sickness and Accident disability benefits was the total extent to which pregnant employees were treated differently, the denial of sick pay by petitioner is only the initial stage of disparate treatment afforded employees who experience pregnancy. While *Gilbert* dealt with disparate treatment during pregnancy and recovery therefrom, this case involves continuing disparate treatment of female employees long after pregnancy itself is all but a memory.

This Court in *Gilbert* recognized that pregnancy is significantly different from typical illnesses and injuries. Therefore, this Court held that disparate treatment of pregnancy by an employer is not in itself sex discrimination and the fact that pregnancy is treated differently from other conditions or situations by an employer does not

itself constitute gender-based discrimination. But, while the disparate treatment of pregnancy may be permissible, the disparate treatment of women who have experienced pregnancy and return, or attempt to return, to employment is impermissible. Petitioner's denial of job-bidding seniority to women returning from pregnancy leave cannot have any rational relationship to pregnancy. In the context of the denial of job-bidding seniority to these women, pregnancy is not the subject of treatment, disparate or otherwise. The denial of accumulated job-bidding seniority does not occur until the female employee attempts to return from pregnancy leave, and therefore, at the time accumulated job-bidding seniority becomes an issue, pregnancy no longer exists. While *Gilbert* involved certain compensation benefits which were not extended to employees, this case involves a situation in which the employee is deprived of something she already has, that is seniority.

This Court recognized in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) and reiterated in *Gilbert*, that a finding that there is not sex-based discrimination as such is not dispositive of a case alleging a violation of Title VII. Distinctions involving pregnancy are utilized by petitioner as mere pretexts to accomplish a forbidden purpose. Distinctions involving pregnancy are used as a justification for disparate treatment of women long after pregnancy is completely finished and are mere pretexts designed to effect an invidious discrimination against women who have, or who are likely to have, pre-school age children during their employment by petitioner.

This is not a case of an employment policy which merely takes cognizance of a sex-related characteristic but is void of an element of favoritism, as in *Gilbert*, but is rather an employment policy which takes cognizance of a sex-related characteristic and does involve an element of favoritism.

ARGUMENT

I. This Case Is Not Controlled by the Supreme Court's Holding in General Electric Company v. Gilbert.

Petitioner asserts that this case is controlled by this Court's decision in *General Electric Co.* v. *Gilbert*, ... U.S. ....., 97 S.Ct. 401 (December 7, 1976). In *Gilbert* this Court examined a challenge under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* (1974), of the policy of General Electric Company of excluding disabilities arising from pregnancy under its Weekly Sickness and Accident Insurance Plan. This Court in *Gilbert* was faced with the rather narrow issue of whether disabilities arising or connected with pregnancy could be excluded from an employer's Sickness and Accident Insurance Plan without violating Title VII. Respondent agrees that petitioner's Sick Leave benefit plan is, in and of itself, for all intents and purposes, the same as the Weekly Sickness and Accident Insurance Plan examined in *Gilbert*. Respondent further agrees that if the exclusion of sick pay was the only manner in which respondent had been treated differently by petitioner, *Gilbert* would control.

Respondent submits that because the exclusion of sick pay is only one of the many ways in which female employees who experience pregnancy are treated differently by petitioner, the holding in *Gilbert* is not controlling. Upon examination of the overall manner in which female employees who experience pregnancy are treated by petitioner, it becomes plain that petitioner's policies are much more pervasive than the mere under-inclusiveness of the Sickness and Accident Insurance Plan in *Gilbert*.

Once an employee of Nashville Gas Company becomes pregnant, and informs the company, a process of classification and segregation is initiated which pervades her actual pregnancy and recovery, and continues for the remainder of her employment by the company. Pregnant employees are confronted with a separate leave policy established and maintained by petitioner. Petitioner maintains various types of leave policies which are utilized by employees absent from their employment due to any reason other than job related illness or accident. When an employee is absent because of a non-job related illness, or non-compensable injury, he or she is placed on "sick leave" and receives pay depending upon his or her length of service with petitioner. There is no limitation placed on the amount of time an employee may remain on "sick leave", although said sick leave stops at some pre-determined point. An employee who desires to absent himself from employment for reasons other than illness or non-compensable injury, may request a "leave of absence" upon having just cause for a reasonable specified length of time. Women employees who become pregnant during their employment with petitioner are required to take what is described in the Employment Manual as a "leave of absence". Although petitioner's written policy in regard to such leave is couched in terms of "leave of absence" the policy as stated in the affidavit of Elmer Henson and the answers to Interrogatories is stated in terms of "pregnancy leave". Although petitioner asserts that "pregnancy leave" is equivalent in all respects to "leave of absence", it is submitted that petitioner maintains three (3) types of leave: "sick leave", "leave of absence", and "pregnancy leave". Although petitioner's "Employee Policy Manual" presents the availability of "pregnancy leave" in permissive terms, to wit:

> In case of pregnancy, an employee, upon written request may be granted a leave of absence. . . . (App. 98),

the District Court found that "actual practice demonstrates that a pregnant employee may not decline to accept 'pregnancy leave', and still retain employee affiliation with the defendant company." (App. 98). A pregnant employee may remain in that status for up to one year. Although there is no statement of policy concerning the status of an employee on "leave of absence" due to pregnancy who is unable to return to work after one year, the District Court found that "a fair inference is that such employee would be terminated." (App. 43).

Had respondent and other pregnant employees been merely denied sick pay, and all disparate treatment ended at that point, *Gilbert* would clearly control. While in *Gilbert* the denial of Sickness and Accident disability benefits was the total extent to which pregnant employees were treated differently, the denial of sick pay by petitioner is only the initial stage of disparate treatment afforded employees who experience pregnancy. In fact, when viewed in the context of the total effect of petitioner's policies on such persons' employment, the denial of sick pay to pregnant employees is of minor consequence and effect.

Once an employee is placed on "pregnancy leave" status by petitioner, the ramifications of such status continue well past pregnancy and recovery therefrom, and continue for the remainder of such woman's employment, while the effects of "sick leave" status end completely upon the employee's recovery from the cause of his or her absence from employment.

Employees, other than supervisors, who are absent from work for extended periods of time due to non-job related injuries or illnesses (i.e. on "sick leave") are generally returned to the position they held previous to their absence, if his or her physical condition permits. (App. 17). Such employees return to their previous position at the same classification rate, are entitled to any pay raises that may have taken effect during their absence (App. 17), are entitled to the seniority which he or she had earned prior to their absence (App. 17), and, in fact, the District Court found that their seniority continues to accumulate during their absence from employment. (App. 45). Further, as appears in at least one instance, even if an employee is unable to perform the duties of the position he or she held prior to being on "sick leave", such person is placed in another permanent position which he or she is able to perform. (App. 19).

The treatment afforded employees who have been on "pregnancy leave" and who return to employment, or, more accurately, attempt to return to employment, is dramatically different. "Pregnancy leave" is limited to one year, while there is no such arbitrary limit placed upon the time allowed for "sick leave" or "leave of absence". A woman returning from "pregnancy leave" is not (as is an employee returning from "sick leave") returned to the position previously held if her physical condition permits, nor, is such employee even assured a return to permanent employment in any position. Rather, it is petitioner's policy to permit employees returning from "pregnancy leave" to return to permanent employment when there is an available position for which such employee is qualified and for which no person permanently employed by petitioner is bidding. (App. 10).

The District Court found there was a legitimate basis for petitioner's decision not to hold respondent's job open in the Accounting Department. Petitioner was considering prior to respondent's pregnancy, and had initiated, the transfer of certain accounting functions to its Computer Processing Department and had undertaken to discontinue its merchandise business. (App. 52). While this finding has not and is not questioned by respondent, it is amply clear that pursuant to petitioner's stated policies this job would not have been held for respondent had there been no legitimate basis for such a failure.

Although employees returning from "sick leave" are returned at their same classification rate and are entitled to any pay raises which may have occurred during their absence, employees returning from "pregnancy leave" are not granted permanent employment status, except under the conditions noted above, but are offered temporary work, if such temporary work is available, until permanent employment becomes available. While in such temporary employment, employees returning from "pregnancy leave" are not paid at the same rate of compensation which they received prior to their commencing "pregnancy leave", but are paid at the rate of compensation which other temporary employees receive who are initially commencing employment with petitioner. Respondent, prior to her commencing "pregnancy leave", was employed in the position of Clerk and was earning the weekly wage of One hundred, forty dollars, eighty cents ($140.80) (App. 11), which is the weekly rate for a Clerk having at least thirty-six (36) months of seniority. (App. 99). Upon her return from "pregnancy leave", having experienced a normal pregnancy, respondent was afforded temporary employment by petitioner from March 14, 1973 to April 13, 1973, at which time such temporary employment ceased. During

such temporary employment, respondent performed the duties of Clerk and received the weekly wage of One hundred, thirty dollars, eighty cents ($130.80), which is the entrance wage for the Clerk's position. (App. 99).

Employees returning from "pregnancy leave", unlike employees returning from "sick leave" do not retain full seniority privileges which had accrued prior to their absence and which accumulate during their absence. An employee who has been on "pregnancy leave" and is allowed to return to permanent employment status, retains the seniority she had previously accumulated for purposes of pension, vacation, etc., but does not retain such seniority for the purposes of bidding on job openings. (App. 10). Respondent was not afforded permanent employment status upon her return but did return to employment in a temporary capacity and while in such capacity did bid on three (3) job openings with petitioner. Had respondent been permitted to retain her job-bidding seniority accumulated prior to the commencement of her "pregnancy leave", she would have had more seniority than each of the other three applicants. (App. 33). The positions were awarded to other employees who were credited with greater job-bidding seniority even though respondent had the earlier date of initial employment. (App. 44). The District Court found that seniority is the primary factor in the job-bidding process and that the failure to credit respondent with seniority for this purpose was the sole reason she failed to gain a permanent position with petitioner following her return from "pregnancy leave". (App. 44).

Petitioner asserts that pregnant employees who are placed on "pregnancy leave" have the same status and limitations as persons who take a "leave of absence". Only two (2) employees (male) have been granted a "leave of absence". One male employee was granted a year's

"leave of absence" to complete work for a college degree, but he did not seek to return to work at the end of his "leave of absence". At the time of trial in the District Court, another male employee was on "leave" to complete his education. (App. 10-11). Apparently these two employees are the only employees who have taken a "leave of absence" for any reason other than pregnancy. Petitioner's Executive Vice-President for Personnel, by affidavit, stated that if the employee who was on "leave" and if any other employee, male or female, were granted a "leave of absence" for reasons other than pregnancy, such employee would be afforded the same treatment as that given to female employees on "pregnancy leave". (App. 11).

While petitioner asserts that the policies are the same for all employees, male or female, returning from "leave" status, it must be recognized, as did the District Court, that pregnant women are required to take "pregnancy leave". In all cases other than pregnancy, the decision to take "leave of absence" is entirely a voluntary matter with each employee. (App. 44). It is only in the case of pregnancy that an employee is denied the opportunity to take "sick leave". (App. 44). It is submitted that petitioner actually maintains three (3) leave policies, to wit: "sick leave" (entitled to all benefits), "leave of absence" (denied certain benefits but entirely voluntary and apparently unlimited as to duration), and "pregnancy leave" (denied certain benefits, entirely involuntary and limited to one year's duration).

For the above described reasons, it is submitted that this case is clearly not controlled by the holding in *Gilbert*. While *Gilbert* dealt with disparate treatment of pregnancy in one area (i.e. disability benefits) and while this case involves disparate treatment of pregnancy in the same area, it also involves disparate treatment of a class of women long after pregnancy is all but a memory.

II. Petitioner's Policy of Not Crediting Employees Returning From Pregnancy Leave With Accumulated Seniority for Job-Bidding Purposes Constitutes Sex Discrimination in Violation of Title VII.

Petitioner contends that the holding in *Gilbert* should also control the decision in this case as to the denial of accumulated seniority for job-bidding purposes. While *Gilbert* did sanction the disparate treatment of pregnancy in the limited context of disability payments during pregnancy, such decision is not controlling as to the denial of accumulated seniority in this cause.

While *Gilbert* dealt with treatment of pregnancy, petitioner's denial of accumulated job-bidding seniority has no actual connection with pregnancy. The denial of accumulated seniority does not occur until such time as the employee is physically able to return to employment following either the birth of a child and the recovery therefrom, or the termination of the pregnancy by other means, and the recovery therefrom. Therefore, at the time accumulated job-bidding seniority becomes an issue, pregnancy no longer exists.

While *Gilbert* involved certain compensation benefits which were not extended, this case does not involve a denial of a benefit, but involves a situation in which the employee is deprived of something she already has, that is, seniority. This Court has rendered decisions which speak of the value and importance of seniority.

For example, in the case of *Humphrey* v. *Moore*, 375 U.S. 335, 346-347 (1964), this Court stated:

> Seniority has become of overriding importance and one of its major functions is to determine who gets or who keeps an available job.

Of course, as previously stated, that is precisely the case here. Seniority determined who was to get the jobs. Respondent was stripped of her previously accumulated job-bidding seniority and did not qualify for jobs to which she would have been entitled.

Seniority has been found to be of such "vast and increasing importance" that in the case of *Franks* v. *Bowman*, ... U.S. ....., 96 S.Ct. 1251 at 1265 (March 24, 1976), this Court has given sanction to remedial systems which create retroactive seniority, that is seniority from the time someone should have been employed, rather than when they were actually employed. Surely if persons are entitled to seniority for time they were not actually working, respondent is entitled to job-bidding seniority for the three years she did work.

In regard to petitioner's policy of denying job-bidding seniority to women who have been on "pregnancy leave" the only connection such policy has to pregnancy is that women who attempt to return from "pregnancy leave" have been pregnant and normally have at least one preschool age child that they did not previously have. While a pregnant woman is significantly different from a woman or a man who has some other type of non-job related illness or injury, a woman who attempts to return to employment from "pregnancy leave" is not significantly or, in fact, any different from a man or a woman who returns from a non-job related illness or injury. In both instances they are employees who have previously recovered from the cause of their absence from employment and are ready, willing, and able to return to employment.

Pregnancy as the cause of former absence from employment is, of course, confined to women. At the time of the scrutiny, that is, at the time such person is ready to return to work, it is in no way significantly different

from other causes of absence from employment. At that point, the cause of the former absence is irrelevant. Although the cause of former absence from employment could be relevant if it is one which has been demonstrated to likely recur, since it could affect the employee's ability to properly perform his duties in the future, there is absolutely no evidence that such a neutral criteria was used by petitioner to determine who is entitled to re-employment. Should such neutral criteria be utilized, it would appear that women returning from "pregnancy leave" would have no difficulty meeting such criteria since their cause of absence, pregnancy, is admittedly completely finished, while conditions such as back sprains, which seem to be a common non-pregnancy cause of absence from petitioner's employment, are likely to recur because of the weakened condition of such employees.

In *Gilbert*, this Court was presented with a case where there could be no similarly situated members of the opposite sex, due to the fact that men cannot become pregnant and due to the significant difference of pregnancy from the typical covered disease. Therefore, there was no showing of an opportunity for dissimilar treatment for similarly situated men and women. But in this case, there are similarly situated members of each sex. Men who return to employment following an absence from employment due to a non-job related illness or injury are similarly situated, and in fact are exactly situated, as women who return to employment following an absence from employment due to pregnancy. Men who return from absence from employment are favored by being allowed to retain all seniority rights to the detriment of similarly situated women who return from absence from employment due to pregnancy and are stripped of their job-bidding seniority. Thus, this is not a case of an employment policy

which merely takes cognizance of a sex-related characteristic but is void of an element of favoritism, as in *Gilbert*, but it is rather an employment policy which takes cognizance of a sex-related characteristic and does involve an element of favoritism.

Respondent is in complete agreement with petitioner's assertion that *Gilbert* stands for the proposition that disparate treatment of *pregnancy* (emphasis added) by an employer is not in itself sex discrimination and the fact that *pregnancy* (emphasis added) is treated differently from other conditions or situations by an employer does not itself constitute gender-based discrimination. But, in the context of petitioner's denial of job-bidding seniority, pregnancy is not the subject of treatment, disparate or otherwise. At the time the job is bid on, pregnancy no longer exists. For, at the time any employee returns or attempts to return to permanent employment the cause of their former absence, whether due to pregnancy or conditions such as heart attacks, is no longer present and the employee is physically able to return to employment.

Petitioner asserts that its policy merely favors those employees who are actively working for the company at the time a job opening becomes available. It is obvious that an employee who is on "sick leave" due to a heart attack or other non-compensable disability is no more "actively working for the company" than is a woman who is on "pregnancy leave". A woman who returns to employment following her recovery from childbirth is no less "actively working for the company" than another employee who returns following a heart attack. While prior to return to permanent employment, there are differences in the cause of absence, the effect (absence) is the same. Once an employee returns to permanent employment from any type of leave they are "actively working for the company". To apply petitioner's language, the petitioner's policy favors men who are "actively working for the company" to the detriment of women who are also "actively working for the company". Further, it is at precisely this point in time, when both classes of employees are again "actively working for the company", that petitioner's favoritism toward similarly situated persons of one sex is apparent.

The denial of seniority rights for job-bidding purposes is obviously one of the evils Congress intended to remove by the passage of Title VII. As stated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 at 431 (1971):

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

It is submitted that the denial of job-bidding seniority to women returning from "pregnancy leave" is an artificial, arbitrary and completely unnecessary barrier to employment which operates to invidiously discriminate on the basis of sex.

Of course, it cannot be said that the petitioner's policy of denying accumulated seniority for job-bidding purposes actually affects all women employees. Nor, taking the petitioner's stated intentions as to the treatment of employees returning from "leave of absence" at face value, can it be said that this policy is applied only to women, but it is not necessary to show that a policy affects all women and only women for there to be a Title VII violation.

This Court has recognized that the effect of Sec. 703 (a) of Title VII is not to be diluted because only a subclass of a protected class is singled out for differential

treatment. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971), *Rev'g* 411 F.2d 1 (5th Cir. 1969). This Court held:

> Sec. 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading the section as permitting one hiring policy for women and another for men—each having pre-school age children. 400 U.S. 542.

It is submitted that merely because petitioner's denial of job-bidding seniority does not actually affect all women employees, but a sub-class thereof, does not dictate a finding that the policy is not promulgated and applied because of such individual's sex.

Although petitioner's stated intention to treat men and non-pregnant women who return from a "leave of absence" the same as women who return from "pregnancy leave", would seem to be facially neutral, the discriminatory effect of this policy upon women is apparent.

It is submitted that the record in this case supplies an ample basis for a finding of discriminatory effect. This Court has recognized that the "Act" proscribes "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation". *Griggs, supra* at 431-432.

The petitioner's job-bidding seniority policy would, under the rationale of both *Gilbert* and *Geduldig* v. *Aiello*, 417 U.S. 484, seem to be facially non-discriminatory in the sense that "there is no risk from which men are protected and women are not and there is no risk from which women are protected and men are not". *Id.* at 496-497. But while it may arguably be facially neutral, petitioner's

policy is discriminatory in operation and effect. In both *Gilbert* and *Geduldig*, this Court recognized that only women were affected by the benefit policy, but found no discriminatory effect because of the unique quality of pregnancy and its attendant cost. In *Gilbert, supra*, at 409-410, this Court noted:

> for all that appears, pregnancy-related disabilities constitute an additional risk, unique to women. This Court recognized that if the employer were to remove the insurance fringe benefits, a woman would have to pay more than a male who purchased identical disability insurance, due to the fact that her insurance had to cover the "extra" disability due to pregnancy.

This Court pointed out that it would cost both parties, an employer with sick leave and an employee with private insurance, an incremental amount and that Title VII's proscription on discrimination does not require, in either case, the employer to pay that incremental amount. Therefore, this Court found a rational basis for such a policy and the fact that it affected women more than men did not render the policy unlawful.

Cost cannot possibly be a factor in petitioner's policy of denying job-bidding seniority to women returning to employment. There is no expense to the employer whatsoever for allowing any employee to retain seniority for job-bidding purposes once he or she has returned to permanent employment. There is no cost to the employer, either incremental or otherwise, for allowing a woman to retain job-bidding seniority upon her return to permanent employment following pregnancy. Nor, can there be any other rational basis for the denial of job-bidding seniority. Therefore, it is submitted that the greater impact upon women employees without a rational basis, dic-

tates a finding of discriminatory effect and a violation of Title VII.

While in *Gilbert*, the increased cost of providing pregnancy benefits provided the business necessity for the policy of excluding pregnancy from the benefit program, petitioner's policy of denying job-bidding seniority has no basis in any sort of business necessity. In fact, it would appear that such a policy creates, rather than avoids, a detriment to the company. By pursuing this policy, petitioner deprives itself of the opportunity to fill job positions with the most experienced employee out of the universe of persons applying for such positions.

Petitioner's policy excludes women from employment on the basis of a sweeping disqualification. All women with any past record of pregnancy while employed by petitioner, regardless of their qualifications, are stripped of job-bidding seniority.

While petitioner's policy of denying accumulated seniority for job-bidding purposes to employees who have been on "pregnancy leave" is stated to apply to all other persons who take "leave of absence", such policy has never been applied to persons on "leave of absence" for reasons other than pregnancy. The only evidence to substantiate the existence of such a policy is found in the company's stated intentions to apply this policy to employees on "leave of absence" for non-pregnancy reasons, which intentions were stated following respondent's challenge of petitioner's employment policies. Assuming that the stated intentions were in fact petitioner's policy, it does not follow that the denial of accumulated seniority to employees on "leave of absence" for non-pregnancy reasons eliminates the sex discrimination of denying accumulated seniority to employees returning from "pregnancy leave". In all cases other than pregnancy, the decision to take a "leave of

absence" is entirely a voluntary matter with each employee. It is only in the case of pregnancy that an employee is denied the opportunity to take "sick leave" and is forced to take "pregnancy leave". (App. 44).

Therefore, assuming that all other non-pregnant employees who take a "leave of absence" are denied accumulated seniority upon their return, it is apparent that, for whatever reason, they have voluntarily chosen to forfeit their rights to accumulated seniority for job-bidding purposes in exchange for the opportunity to take a "leave of absence" from their employment. Employees who become pregnant, either voluntarily or accidentally, do not choose to forfeit their seniority rights, but rather, are forced to do so by taking "pregnancy leave". Thus, petitioner's policy classifies and segregates employees who become pregnant without any element of choice on the part of such employee and without any rational basis or compelling business necessity. This policy of classifying and segregating employees violates §703(a)(2) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2 (a) (1974), which in pertinent part provides:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise, adversely affect his status as an employee, because of such individual's . . . sex . . .

The denial of accumulated seniority for job-bidding purposes obviously deprives or tends to deprive women who have experienced pregnancy of employment opportunities. The denial of seniority prevents such employees

from becoming re-employed by the petitioner, with all the attendant increases in responsibility and compensation, which they would be entitled to, but for the denial of accumulated seniority. The extent of such deprivation of employment opportunities is vividly illustrated in the present case. Respondent bid on three (3) positions and was denied employment in all three positions. The failure to credit respondent with seniority for this purpose was the sole reason she failed to gain the positions. (App. 44). Had respondent been credited with seniority for job-bidding purposes, she would have acquired permanent employment status on March 14, 1973 in the position of PBX Operator at an increased salary from her former salary of One hundred, forty dollars, eighty cents ($140.80) (App. 11), to a salary of One hundred, forty-seven dollars, twenty cents ($147.20) (App. 100) and would have had different responsibilities and, presumably, increased responsibilities.

Nor, can it be doubted that such policy adversely affects the employees' status. Respondent, as all other women who return from "pregnancy leave", was unable to obtain the positions for which she otherwise would have been entitled and was prevented from acquiring the status of a permanent employee due solely to the denial of accumulated seniority for job-bidding purposes.

Section 703(a)(2) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) in pertinent part provides:

> Section 703(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .

Nor, can it be disputed that the denial of seniority for job-bidding purposes amounts to a refusal to hire an individual. Petitioner failed and refused to hire respondent for the three (3) positions for which she applied. This refusal was based on the denial of the accumulated seniority for job-bidding purposes. Likewise, petitioner's policy dictates a refusal to hire any woman for all permanent positions, save those which are vacant and for which no current employee is bidding, who return from "pregnancy leave" solely on the basis of the denial of seniority for job-bidding purposes. Clearly, this policy also affects the privileges of employment for all women who attempt to return to employment following "pregnancy leave".

III. The Supreme Court's Holding in General Electric Company v. Gilbert Does Not Endorse Exclusion of Sick Leave Benefits for Pregnant Employees in a Situation in Which Distinctions Involving Pregnancy Are Mere Pretexts Designed to Effect an Invidious Discrimination Against the Members of One Sex.

This Court recognized in *Geduldig*, and reiterated in *Gilbert*, that finding that there is not sex-based discrimination *per se* is not dispositive of a case alleging a violation of Title VII. This Court recognized in *Gilbert*, *supra* at 404 that should it be shown: ". . . that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other . . .", the analysis of a policy must continue. It is submitted that distinctions involving pregnancy, which standing alone have been sanctioned by *Gilbert*, as used by petitioner are mere pretexts and a subterfuge to accomplish a forbidden purpose.

This Court has recognized in *Phillips, supra,* that §703(a) of the Civil Rights Act of 1964 does not permit one hiring policy for women and another for men—each having pre-school age children. Although, apparently, the District Court did not address the issue and thus did not make a finding as to whether distinctions involving pregnancy were mere pretexts, there is ample proof in this record to support a finding that petitioner attempts to accomplish a forbidden discrimination of maintaining one employment policy for women and another for men—each having pre-school age children. The only meaningful distinction between petitioner's employment policies and that of Martin Marietta in *Phillips* is that petitioner's policies are directed to current employees while the policies in *Phillips* were directed to initial applicants for employment.

Petitioner maintains a policy of placing persons who experience pregnancy on "pregnancy leave" upon their absence from employment which causes attendant loss of sick pay privileges which are enjoyed by other employees who become absent from employment due to non-pregnancy causes. This differential treatment would, standing alone, be justified by distinctions involving pregnancy. But, petitioner's utilization of these distinctions as a subterfuge becomes apparent when the treatment of employees is examined following their return or attempt to return to employment.

While employees returning or attempting to return to employment from "pregnancy leave" are treated dramatically different from employees who return from "sick leave", the only distinguishing factor is that women who are on "pregnancy leave" can be expected and do normally have a pre-school age child during the term of their employment by petitioner. It is submitted that petitioner's policy which treats ditferently employees who have re-

turned from "sick leave" and who are actively working for the company from women who have returned from "pregnancy leave" and who are also actively working for the company, is unlawful discrimination. The only possible identifiable basis for such a distinction is the fact that a woman who returns to employment from pregnancy leave then has a pre-school age child. It is submitted that this type of discrimination is forbidden and petitioner's use of distinctions involving pregnancy is a subterfuge to accomplish this forbidden discrimination.

It is apparent that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against women who have, or who are likely to have, pre-school age children during their employment by petitioner. Distinctions involving pregnancy are used as a justification for disparate treatment of women long after pregnancy is completely finished. Because of petitioner's use of distinctions involving pregnancy as mere pretexts and as a subterfuge for a forbidden discrimination, petitioner's denial of sick leave benefits to pregnant women should not be allowed.

Distinctions involving pregnancy are not utilized by petitioner in a rational determination to exclude pregnancy from its sick leave plan, as in *Gilbert,* but are utilized as a subterfuge to accomplish a forbidden discrimination.

Petitioner's policy of stripping women who return from "pregnancy leave" of the majority of their former employment privileges has a chilling effect on such women's desire and ability to remain in the employ of petitioner. While petitioner does not openly rid itself of women with pre-school age children, the effect of petitioner's policies is to create artificial, arbitrary, and unnecessary barriers to employment which operate to invidiously discriminate

against women who have pre-school age children. While the means utilized by petitioner are not as drastic and patent as the firing of such employees would be, respondent's request for complete termination to enable her to receive unemployment compensation is a graphic example of the similarity in effect. Thus, petitioner's exclusion of a sex-linked disability (i.e., pregnancy) from the universe of compensable disabilities was not the product of neutral-persuasive actuarial considerations, but rather stemmed from a policy of utilizing a pregnancy-centered differentiation as a mere pretext designed to effect an invidious discrimination against the members of one sex.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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